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In The
Supreme Court of the United States

OCTOBER TERM, 1963

No. 405

WILLIE PEEVYHOUSE and LUCILLE PEEVYHOUSE,
Husband and Wife,
Petitioners,

vs.

GARLAND COAL & MINING COMPANY,
a Corporation,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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OPINION BELOW

The Oklahoma Supreme Court, on December 11, 1962, entered its opinion in this cause, written by Justice

Jackson, with concurrence by Justice *Williams*, Davison, Halley and Johnson.

On March 26, 1963, the Court filed an order that the vote on the original opinion be *modified* to show Justice Williams as dissenting.

On March 26, 1963, the Court entered a Supplemental Opinion reaffirming their opinion of December 11, 1962. Justice *Welch* joined Jackson, Davison, Halley and Johnson on the supplemental opinion.

STATEMENT OF THE CASE

Respondent, lessee in a coal mining lease upon Petitioner's land, contracted to perform certain remedial work after mining, including: a) fill pits along fence lines, so new fences could be built, b) smooth off tops of soil banks, c) establish crossings at certain points along the property lines, d) leave no shale or dirt on high wall side of pits.

The lease did not require the pits to be filled so that the land would be suitable for agricultural uses.

Respondent breached the contract and Petitioners sought to recover as damages, the cost of the remedial work. A jury verdict was returned for $5,000.00, and was reduced on appeal to $300.00 as the increase in the market value of the land, in its mined over condition.

attributable to performance of the remedial work.

The Oklahoma Supreme Court entered an opinion and supplemental opinion properly applying as the measure of damages Oklahoma Statutes which provide that damages for breach of an obligation cannot exceed the gain from full performance thereof, and that damages must be reasonable.

The decision of the Oklahoma Supreme Court does not violate the United States Constitution; and Certiorari is not proper.

STATEMENT OF ISSUES

The Petition for Writ of Certiorari presents to this Honorable Court the following issues:

1. Is ground for Certiorari, under alleged violation of Article 1, Section 10 of the Constitution (impairment of contract), presented, where the decision of the Oklahoma Court followed a State Statute that recovery for breach of contract cannot exceed the amount that plaintiffs would have gained from full performance?

2. Is Certiorari proper, for alleged violation of due process, under Amendments V and XIV of the Constitution, where one of five judges caused the Oklahoma Court to order that its original opinion was modified to show that he dissented, rather than concured, in the majority opinion and another judge who had not participated in the original opinion joined to concur, after petition for re-hearing?

ARGUMENTS

PROPOSITION ONE

There is no ground for Certiorari under Petitioners' contention that the decision of the Oklahoma Supreme Court violates Article I, Section 10 of the United States Constitution, as impairing the obligation of a contract.

Petitioners contend that the Oklahoma Supreme Court's decision judicially impaired the Petitioners' contract with the Respondent by overruling (which it actually did not) an earlier decision which was decided before the contract in question was executed. This is unsound.

Article I, Section 10, of the United States Constitution provides:

> "No state shall pass a law impairing the obligation of a contract."

In *Barrows vs. Jackson*, 346 U. S. 249, 270, 73 S. Ct. 1031, 1037, L. Ed. 1586, 1591, it was held:

> "It has been settled by a long line of decisions, that the provision of Section 10, Article I of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of the Courts."

The general rule is that a judicial act does not constitute a constitutionally prohibited impairment of contract. This rule applies even though a state court over-

rules its former construction of a statute. *Fleming vs. Fleming*, 264 U. S. 29, 31, 44 S. Ct. 246, 247, 68 L. Ed. 547, 549, in dismissing a Writ of Error for lack of a substantial federal question, this Court stated:

> "It is assigned for error that in this ruling the supreme court of the state reversed its former rulings, under which such a contract of partnership had been held to be valid, and not avoided by § 3376 or any other section of the Code; that on the face of these rulings the partnership contracts herein had been entered into, and that the new construction of the statute was an impairment of the contracts of partnership in violation of Art. I, § 10 of the Federal Constitution. * * * It is urged upon us that the impairment here is legislation, in that the case turned on the effect § 3376 of the Iowa Code, that the subsequent judicial construction of it became part of the statute and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed before the making of the contract and has become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means."

There is one exception to this rule. The exception is that a state court may not alter the obligations of a municipality on its public bonds by overruling a decision which was in effect at the time the bonds were issued. Even this exception applies only where the ap-

peal is from a federal court judgment. It does not apply where the appeal is from a state court judgment.)

Tidal Oil vs. Flanagan, 263 U.S. 444, 451, 44 S. Ct., 197, 198, 68 L. Ed. 382:

> "It has been settled by a long line of decisions that the provision of § 10, *Article I, of the federal Constitution, protecting the obligation of contracts against state action is directed only against impairment by legislation and not by judgment of courts.* The language: 'No state shall * * * *pass any* * * * *law* impairing the obligation of contracts' plainly requires such a conclusion. However, the fact that it has been necessary for this court to decide the question so many times is evidence of persistent error in regard to it. Among the cases relied on to sustain the error are (there follows a list of cases which list includes *Gelpske vs. Dubuque* and *Douglas vs. Pike County*, both of which are cited at p. 16 of the Petitioners' brief) . . . These cases were not writs of error to the Supreme Court of a state. They were appeals or writs of error to federal court where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a state prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different states held themselves free to decide what the state law was, and to enforce it as laid down by the State Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, Section 10, of the federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases under the third article of the federal

> Constitution they were empowered to do . . . Had such cases been decided by the state courts however, and had it been attempted to bring them here by writ of error to the State Supreme Court, they would have presented no federal question, and this court must have dismissed the writs for lack both of power and jurisdiction." (Emphasis added).

It will be noted that all authorities relied upon by the Petitioners to support their contention that a judicial act may impair contracts in violation of Art. I, § 10 of the United States Constitution involve bonds of a governmental entity wherein the Petitioner was asking relief from the judgment of a lower federal court. They cannot serve as authority in this case which involves neither governmental bonds nor asks for relief from the judgment of a lower federal court.

Without citation of authority the Petitioners argue that judicial impairment of contracts constitutes a violation of due process under the 14th amendment. This contention is disposed of by *Tidal Oil Co. vs. Flanagan, supra*:

> ". . . the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law."

Even if a judicial act could violate Art. I, § 10, of the United States Constitution by overruling a prior

decision, there would be no violation of that constitutional provision in this case. The factual distinction between the instant case and *Ardizonn vs. Archer*, 72 Okla. 70, 178 P. 263 (1919) cited at p. 16 of the Petitioners' brief is such that the Ardizonn case was distinguished—not overruled. This distinction is well stated by the majority of the Supreme Court of Oklahoma in *Peevey-house vs. Garland Coal & Mining Co.*, 382 P. 2d 109, 111, (Okla. 1963):

> "*It appears that this precise question has not heretofore been presented to this court.* In *Ardizonn vs. Archer*, 72 Okla. 70, 178 P. 263, this court held that the measure of damages for breach of a contract to drill an oil well was the reasonable cost of drilling the well, *but here a slightly different factual situation exists.* The *drilling of an oil well will yield valuable geological information, even if no oil or gas is found*, and of course, if the well is a producer, the value of the premises increases. In the case before us, it is argued by the defendant with some force that the *performance of the remedial work defendant agreed to do will add at most only a few hundred dollars to the value of the plaintiffs' farm*, and that the damages should be limited to that amount because that is all the plaintiffs have lost."
>
> * * * * * * *
>
> "In view of the unrealistic fact situation in the instant case, and *certain Oklahoma statutes to be hereinafter noted*, we are of the opinion that the

'relative economic benefit' is a proper consideration here. This is in accord with the recent case of *Mann v. Clowser*, 190 Va. 887, 59 S.E. 2d 78, where, in applying the cost rule, the Virginia court specifically noted that '* * * the defects are remediable from a practical standpoint and the costs *are not grossly disproportionate to the results to be obtained.*' (Emphasis supplied).

23 O.S. 1961 §§ 96 and 97 provide as follows:

"§ 96. * * * Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he would have gained by the full performance thereof on both sides. * * *

"§ 97. * * * Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered." (Emphasis added)

From the above, it is apparent that the Oklahoma Supreme Court did not impair the obligation of Petitioners' contract. The validity of the contract was recognized; but, *as a case of first impression*, it was properly held that the above quoted statute meant what it said — that the measure of damage should be "economic loss", and not "cost of performance." Without ignoring the statutes above quoted, the Oklahoma Supreme Court could have reached no other conclusion than it did.

It is respectfully submitted that the petition herein presents no ground for Certiorari.

PROPOSITION TWO

The issues of due process and equal protection, including the alleged impropriety of the voting on the opinion of the Oklahoma Supreme Court, were not timely raised and are without merit.

The Petition does not indicate what portion of the record the objection to the voting was raised in the state court; and search of the record does not reveal that the question was ever raised in the state court. Since the question was not raised there it should not be considered here. 28 U S C 1257 (c); Rule 23 (1)(c); *Ellis vs. Dixon*, 349 U S 458, 460, 75 S. Ct. 850, 852, 99 L.ed. 1231, 1234:

> "The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not opened here."

Even if this question were to be considered by the court it is without merit. The Petition states that in the Oklahoma Supreme Court's opinion of December 11, 1962, three judges concurred with Justice Jackson. Examination of the Oklahoma Supreme Court's Opinion of December 11, 1962, as actually filed, reveals that

four judges concurred with Justice Jackson, making a total of five justices, which constitutes a majority of the nine man court. Investigation with the clerk of the Oklahoma Supreme Court reveals that West Publishing Co. has recognized the error in its advance sheet as set forth in the Petitioners' brief. This error will be corrected in the bound volume, in accordance with the order of the Supreme Court of Oklahoma filed September 19, 1963, a certified copy of which was sent to the Court along with this brief.

On March 26, 1963, an order was filed modifying the vote of December 11, 1962, to show Justice Williams as dissenting. (Appendix C of the Petition). At page 10 of the Petitioners' brief, it is erroneously stated that the original opinion was *corrected* to disclose that Justice Williams had dissented. Actually, the opinion was *modified* to show a *change* in his vote long after the original opinion.

On March 26, 1963, the order changing Justice Williams' vote was filed. On the same day the Oklahoma Supreme Court filed its Supplemental Opinion (Appendix B of the Petition), wherein Justice Welch who was not shown as voting on the December 11, 1962 opinion, joined with the majority to make the decision five to four.

In *Waaner Electric Manufacturing Co. vs. Lyndon*, 362 U. S. 396, 252, 43 S. Ct. 580, 591, 67 Law Ed. 961, 964, this court stated:

> ". . . when the review by four judges is given, and an opinion is rendered by three of them, constituting a quorum, the mere fact that the fourth did not hear the oral argument, but wrote the opinion on the printed argument, is at most an irregularity, which does not in the slightest degree effect the validity of the judgment."

Petitioner has presented no authority that such procedure would violate Due Process. This Honorable Court, on Petition for Certiorari, should not review a strictly procedural matter that had been followed by the Oklahoma Court, without objection by Petitioners. The West Publishing Company advance sheet is not an official report of the Oklahoma Supreme Court; and its erroneous report (382 P. 2d 709) is no ground for the contention that the opinion was "four to four."

It is respectfully submitted that Petitioners have presented no ground for Certiorari under Due Process or Equal Protection.

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